Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT D. SPRAGUE, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Retirees of General Motors Corporation made claims under an ERISA plan for vested lifetime health care benefits at GM's expense. Early retirees also claimed that GM entered into separate bilateral early retirement agreements for free lifetime health care. All summary plan descriptions ("SPDs") contained explicit promises of lifetime health care at no cost to retirees. Some SPDs also contained a general reservation of GM's right to change the plan. The questions presented are:

1. Do express promises of lifetime health care in ERISA SPDs vest benefits at retirement?
2. Are bilateral contracts for lifetime health care enforceable under ERISA?
3. Did the court of appeals misapply Fed. R. Civ. P. 23 as to the early retirees, effectively closing the courts to class actions for ERISA benefits?

PARTIES

Petitioners are salaried retirees of respondent General Motors Corporation ("GM"), or surviving spouses of salaried retirees, who retired or agreed to retire prior to March 1988, when the first of the changes challenged in this case became effective. The 113 named plaintiffs in the action below, petitioners here, are: Robert D. Sprague, Leonard P. Moeller, M. Scott Pruyn, Robert J. Unkrich, Kenneth H. Adair, Donald D. Agostino, Oren R. Alger, Marvin S. Allen, Jack M. Amie, Alfred A. Anderson, Austin B. Anthony, Benjamin J. Aponik, Owen Ard, Joseph R. Aron, Edwin C. Ault, Jr., Omer Bailey, Clare W. Baird, Lewis E. Ballard, Elizabeth R. Baly, Robert J. Benson, Richard J. Berube, Robert H. Bickmeyer, Floyd C. Biggs, Walter H. Boemker, Anthony S. Boldizar, Russell B. Boone, Harold J. Bourcier, Victor J. Briscoe, Raymond H. Brownlie, James T. Bruce, Donald H. Buggia, Clinton W. Burns, James R. Cagle, Curtis T. Carlson, Robert B. Chinnock, Samuel A. Clapp, Jearild S. Colman, Jr., William J. Conley, Murlyn D. Conover, Ronald L. Conrow, Ellis W. Cook, Jr., Gordon P. Coulman, Richard G. Coursen, Breese E. Dame, Norman O. Davis, Arthur C. DeMaria, Geraldine Dombrowski, Francis B. Doonan, Kenneth E. Engle, Otto D. Ethridge, Shirley Faroh, Mae L. Fellows, John D. Fittro, Gerald M. Flynn, Mary G. Franklin, Roy C. Freeman, Melvin E. Frey, John C. Funk, Carl A. Gabrielson, John F. Gerald, Howard F. Gillard, Joseph A. Gillen, Jr., John B. Gingell, Robert L. Goodwin, Earl T. Gordon, Carl W. Greenman, Carl G. Groaning, Paul J. Groseclos, Olan G. Hafley, William C. Harkins, Florence Harner, Chris L. Hawkins, Richard C. Hayes, Bernard H. Hendricks, Prudie Holbrook, Leita M. Holdaway, Ernest R. Hoyt, Walter F. Huppenbauer, Harold L. Knicely, Henry E. Knight, Thomas A. Kolander, Leonard J. Komasara, Edwin T. Konieczny, Walter Lampert, Christoph J. Lorenz, Francis M. Lumley, Jerry McConnell, Edward Mendes, Loren D. Meyer, Hal C. Meyers, Wilfred B. Negrete, Donald W. Nesbit, Henry E.

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
1. Statement of Facts	3
a. The GM Salaried Health Care Program	3
b. Early Retirement Programs	4
c. SPDs and Other General Booklets	5
d. Insurance Documents and the 1985 "Draft" Plan	6
2. District Court Proceedings	7
3. Sixth Circuit Proceedings	9
REASONS FOR GRANTING THE WRIT	12
I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER EXPRESS PROMISES OF LIFETIME HEALTH CARE IN ERISA SUMMARY PLAN DESCRIPTIONS VEST BENEFITS AT RETIREMENT	12
II. THE SIXTH CIRCUIT'S REJECTION OF THE EARLY RETIREMENT AGREEMENTS CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS UPHOLDING INDIVIDUAL BENEFIT ARRANGEMENTS UNDER ERISA	16

TABLE OF CONTENTS—Continued

Page

III. THE SIXTH CIRCUIT'S DECISION MISAPPLIED FED.R.CIV.P. 23, DEPRIVING CLASS ACTION TREATMENT FOR ERISA CASES WITH UNIFORM CLAIMS 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases Page

Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988) 21
Aiken v. Policy Management Sys. Corp., 13 F.3d 138 (4th Cir. 1993) 14
Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3d Cir. 1992) 15
Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997) 21
Barker v. Ceridian Corp., 122 F.3d 628 (8th Cir. 1997) 12, 13, 14, 15
Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir.) (*en banc*), *cert. denied*, 510 U.S. 909 (1993) 15, 19
Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984) 15
Chiles v. Ceridian Corp., 95 F.3d 1505 (10th Cir. 1996) 12, 13, 14
Cvelbar v. CBI Illinois, Inc., 106 F.3d 1368 (7th Cir.), *cert. denied*, 118 S. Ct. 56 (1997) 18
Diehl v. Twin Disc, Inc., 102 F.3d 301 (7th Cir. 1996) 12, 13, 15
Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) 18
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) (*en banc*) 17
Edwards v. State Farm Mut. Auto. Ins. Co., 851 F.2d 134 (6th Cir. 1988) 13
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 17, 19
Forbush v. J. C. Penney Co., Inc., 994 F.2d 1101 (5th Cir. 1993) 21
Frahm v. Equitable Life Assurance Society, —— F.3d ——, 1998 WL 81457 (7th Cir. 1998) 18
Fuller v. CBT Corp., 905 F.2d 1055 (7th Cir. 1990) 14
Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851 (4th Cir. 1994), *cert. denied*, 514 U.S. 1057 (1995) 14

TABLE OF AUTHORITIES—Continued

Page

Grimo v. Blue Cross/Blue Shield, of Vermont, 34 F.3d 148 (2d Cir. 1994) 17
Hamilton v. Air Jamaica, Ltd., 945 F.2d 74 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992) 18
Hansen v. Continental Ins. Co., 940 F.2d 971 (5th Cir. 1991) 13, 14
Heidgerd v. Olin Corp., 906 F.2d 903 (2d Cir. 1990) 14
In Re Unisys Corp. Retiree Med. Benefit ERISA Litig., 58 F.3d 896 (3d Cir. 1995) 13
Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp., 122 F.3d 228 (5th Cir. 1997) 15
Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) 15
Kenney v. Roland Parsons Contracting Corp., 28 F.3d 1254 (D.C. Cir. 1994) 17
McKnight v. S. Life & Health Ins. Co., 758 F.2d 1566 (11th Cir. 1985) 14
Memorial Hospital Sys. v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990) 17
Miller v. Taylor Insulation Co., 39 F.3d 755 (7th Cir. 1994) 17
Oubre v. Entergy Operations, Inc., 118 S.Ct. 838 (1998) 19
Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72 (2d Cir.), *cert. denied*, 117 S. Ct. 511 (1996) 14
Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985) 17
Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (*en banc*) 18
Sprague v. General Motors Corp., 768 F. Supp. 605 (E.D. Mich. 1991) ("*Sprague I*") (A. 224a) 3, 5-7
Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994) ("*Sprague II*") (A. 114a) ....*passim*
Sprague v. General Motors Corp., 857 F. Supp. 1182 (E.D. Mich. 1994) ("*Sprague III*") (A. 92a) 2, 8, 9

TABLE OF AUTHORITIES—Continued

Page

Sprague v. General Motors Corp., 92 F.3d 1425 (6th Cir. 1996) (panel) (A. 54a) 2, 9, 14
Sprague v. General Motors Corp., 102 F.3d 204 (6th Cir. 1996) (A. 238a) 3
Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998) (*en banc*) (A. 1a) ..... *passim*
Stewart v. KHD Deutz of America, Corp., 980 F.2d 698 (11th Cir. 1993) 13, 15
United Paper Workers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252 (5th Cir. 1990) 15
Varity Corp. v. Howe, 516 U.S. 489 (1996) 18
Williams v. Midwest Operating Engr's Welfare Fund, 125 F.3d 1138 (7th Cir. 1997) 14
Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991) 18
Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993) 14

Statutes and Regulations

28 U.S.C. § 1254(1) 3
28 U.S.C. § 1331 7
28 U.S.C. § 1337 7
Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* 3
29 U.S.C. § 1002 ..... 3, 17
29 U.S.C. § 1022 3
29 U.S.C. § 1102 ..... 3, 7, 10, 16
29 U.S.C. § 1132 ..... 3, 7, 15

Other Authorities

Fed. R. Civ. P. 23 ..... 8, 19-22
Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992) 21

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PETITION FOR WRIT OF CERTIORARI

This case presents sharp legal issues of recurring national importance concerning the vesting of ERISA welfare benefits in retirement. The courts of appeals are in conflict concerning which ERISA plan documents govern the vesting of benefits, the language needed to vest benefits, and the enforceability of individual ERISA benefit agreements.

This case illustrates why the conflicts in the courts will not abate without resolution by this Court. Over two decades GM induced tens of thousands of salaried employees into early retirement. GM contracted in writing with these retirees for lifetime health care at GM's expense and other benefits in exchange for their early departure. Later, GM shifted health care costs to retirees and surviving spouses, claiming the contracts were unenforceable under ERISA. The same cycle—corporate

downsizing, inducements to retire, and post-retirement changes to rescind benefit promises—continues nationwide. Along with it, the lower courts continue to struggle to reconcile ERISA's technical rules with ERISA's mandate to protect contractually defined benefits.

Unlike the Sixth Circuit here, other courts of appeals have been frank to acknowledge the split in the circuits on the difficult issue of ERISA welfare benefit vesting. The courts are split on whether the presence of both a lifetime promise and a general reservation of the right to amend in the same summary plan description ("SPD") is an ambiguity on the vesting question; whether a lifetime promise in an SPD governs a general reservation in the underlying plan; and whether benefits may vest only if ERISA plans or SPDs are unambiguous in favor of the employees.

Factual variations among ERISA welfare plans are myriad, yet the core legal conflicts are pervasive and persistent. This case presents the vehicle to resolve these conflicts and provide definitive guidance to millions of plan participants and administrators alike.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, entered January 7, 1998, 133 F.3d 388, is reprinted in the Appendix at 1a. The following orders and opinions are also reprinted in the Appendix: August 14, 1996, 92 F.3d 1425 (6th Cir.) (panel decision) (vacated) (A. 54a); August 4, 1994, Final Judgment (E.D. Mich.) (A. 89a); July 18, 1994, 857 F. Supp. 1182 (E.D. Mich) ("*Sprague III*") (decision in favor of early retirees on estoppel; summary judgment for GM on claims of general retirees; grant of partial injunctive relief to early retirees) (A. 92a); February 2, 1994, 843 F. Supp. 266 (E.D. Mich.) ("*Sprague II*") (findings and conclusions after trial on ERISA contract claims of two principal subclasses of early retirees; denial of GM motion to decertify class) (A. 114a); April 9, 1992, Order

Amending Class Certification (E.D. Mich.) (A. 220a); November 4, 1991, Order on Class Certification (E.D. Mich.) (A. 221a); July 29, 1991, 768 F. Supp. 605 (E.D. Mich.) ("*Sprague I*") (partial summary judgment for GM on general plan vesting issues and denial of GM's motion with regard to bilateral contract claims of early retirees) (A. 224a); November 7, 1996, 102 F.3d 204 (6th Cir.) (grant of rehearing) (A. 238a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit *en banc* was entered on January 7, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, are set forth in the Appendix. Included are relevant portions of the following: Section 3, 29 U.S.C. § 1002, Definitions ("employee welfare benefit plan" and "employee benefit plan") (A. 240a); Section 102, 29 U.S.C. § 1022, Plan Description and Summary Plan Description (A. 240a-241a); Section 402, 29 U.S.C. § 1102, Establishment of Plan (A. 242a); and Section 502, 29 U.S.C. § 1132, Civil Enforcement (A. 242a-243a).

STATEMENT OF THE CASE

1. Statement of Facts.

a. *The GM Salaried Health Care Program.*

From the mid-1960s GM provided health care benefits to salaried retirees and surviving spouses. GM assumed the full cost of the basic hospital and medical expense coverage (A. 125a). No deductibles or copayments were required for the basic coverages (A. 217a). Prescription drug, vision, dental, and hearing aid coverages were added later, for which individual copayments were required (A. 126a).

In 1988 GM implemented major changes in its salaried health care program, affecting approximately 84,000 salaried retirees and surviving spouses (A. 217a). Salaried retirees were required to pay program-wide deductibles and copayments for basic coverages (A. 127a), thereby losing "first dollar coverage" (A. 217a-218a). Vison, hearing aid, and other coverages were also eliminated (A. 127a-128a). Individual copayments continued to be charged separately even after the major changes in deductibles and copayments were imposed (A. 218a). GM made additional changes during the lawsuit, and retirees now pay up to $5,000 annually for out-of-pocket expenses (A. 216a n.22; Tr. Exs. 65, 66, R433).

b. *Early Retirement Programs.*

From 1974 to 1987 GM downsized its workforce, using various incentive programs to encourage early retirement by salaried employees otherwise ineligible for full retirement benefits (A. 115a). Some of the early retirement programs were corporatewide, and others applied to particular divisions or plants (*id.*).

Early retirement under the programs required a written agreement between GM and the salaried employee (A. 129a-136a). Employees signed "Statements of Acceptance" of early retirement indicating that they reviewed and accepted benefits under the program (A. 184a-186a). By executing the agreements, the early retirees gave up future employment with GM and waived rights to state claims against GM (A. 186a).

In connection with the agreements, early retirees received written benefit explanations summarized in detail in the decision in *Sprague II* (A. 136a-180a, 203a-219a). Approximately five dozen forms were used over the fourteen-year period (A. 136a-137a). Some were lengthy (*e.g.*, Tr. Ex. 733, R433, 47 pages); others were briefer (*e.g.*, A. 138a-142a, 161a-162a (Morris memorandum, 3 pages; Saginaw Steering Gear, 1 page)). All benefit

explanations were authorized communications of GM (A. 214a-215a).

c. ***SPDs and Other General Booklets.***

Between the passage of ERISA and the time of the challenged changes, GM issued seven plan summaries that, the district court found, served as ERISA summary plan descriptions ("SPDs") (A. 180a-183a). Summaries dated 1974, 1977, 1980, and 1985 for active employees were entitled "Your GM Benefits." Summaries dated 1977, 1980, and 1985 for retired employees were entitled "Your Benefits in Retirement" (*id.*).

Each of the seven SPDs contained one or more statements that: "Your basic health care coverages will be provided at GM's expense for your lifetime. . ." (A. 229a).

The 1974, 1977 and 1980 "Your GM Benefits" summaries contained no language reserving GM's right to change or terminate the plan (A. 39a-40a) (Martin, C.J., dissenting). The 1985 "Your GM Benefits" and "Your Benefits in Retirement" summaries stated that GM "reserves the right to amend, change or terminate the Plans and Programs described in this booklet" (A. 234a). The 1977 and 1980 "Your Benefits in Retirement" summaries contained no reservation of rights language but stated that benefits were "subject to change." *Id.*; see A. 194a ("changes were always communicated to employees as positive improvements").

Before the passage of ERISA GM put out booklets dated 1965, 1966, 1968, and 1971 (A. 180a-181a). Each contained one or more statements that GM would pay the full cost of basic health care coverages for the lifetime of the retiree and surviving spouse. Three of the four also contained general reservation of rights language (*id.*).

In sum, from 1965 through 1985 each booklet or SPD contained explicit provisions for lifetime health care

at GM's expense. Between 1971 and 1985 no general reservation of rights language appeared in any summary.

d. *Insurance Documents and the 1985 "Draft" Plan.*

Before 1985 GM operated the salaried health care program under insurance arrangements. There was no separate document designated as the ERISA plan. The district court found that the various contracts and certificates of insurance were underlying plan documents (A. 233a). In concluding that GM unambiguously had reserved the right to change the plan in underlying plan documents, however, neither the district court nor the court of appeals referred to any reservation of rights language in insurance documents. A. 236a & n.8 (referring instead to language in SPDs); *see* A. 3a-4a n.2, A. 17a-18a (affirming district court). The insurance contracts and certificates did not contain reservation of rights language (Tr. Exs. 509-524, 526-534, 536, R433, R435).

In 1985 GM became self-insured. The Sixth Circuit *en banc* majority accepted the district court's finding that a 1985 draft program statement was an underlying plan document for this period (A. 3a; *see* A. 227a). The document stated that GM could change enrollee rates of payment or any other program terms and conditions (A. 19a n.10).

The 1985 document had a typewritten cover sheet marked "draft" with the title "The General Motors Health Care Insurance Program for Salaried Employees" (Tr. Ex. 451, R433, R435). The document itself applied only to "hourly" employees, however, and in reality was the text of a GM-UAW health care collective bargaining agreement for hourly employees (*id.* at 759-60; R69, Exs. 19, 20). GM did not distribute it to salaried employees or inform them of its existence (11/2/89 Hall Dep. at 256, R1).

2. District Court Proceedings.

Petitioners filed this case in 1989 as a class action under ERISA. The complaint included the following claims: GM failed to maintain its salaried health care plan in a "written instrument" as required by 29 U.S.C. § 1102 (Count I); the challenged changes violated the terms of the health care plan, including SPDs which promised free lifetime health care coverage without any reservation of rights language (Count II); GM contracted with early salaried retirees for lifetime health care at GM's expense (Counts II and IV); GM was estopped from denying such coverage to all salaried retirees (Count V); and GM breached its fiduciary duty to retirees (Count III). The district court had jurisdiction over all the claims in the action under 29 U.S.C. § 1132(e) and, with respect to the ERISA contract claims based on federal common law, under 28 U.S.C. §§ 1331 and 1337 as well.

Early in the case the district court in *Sprague I* granted GM's motion for partial summary judgment as to the general plan issues, deciding that GM unambiguously had reserved the right to modify the salaried health care plan during petitioners' retirement (A. 224a). The district court's ruling relied on reservation of rights language and "subject to change" language found in some SPDs (A. 229a-230a, 233a-236a). The court also granted GM's motion to dismiss the claims for breach of fiduciary duty (A. 237a).

At the same time, the district court allowed the claims of early salaried retirees to proceed, stating that GM might have "bilaterally contracted to provide vested benefits to early retirees," and that these "early retirement agreements may be enforceable under ERISA as independent bilateral contracts or as modifications of GM's health care benefit plan" (A. 236a).

The court then certified the class of approximately 50,000 early retirees (A. 221a-223a; *see* A. 117a-118a).

At GM's request, the court narrowed the class certification to one under Fed. R. Civ. P. 23(b)(2) (A. 220a). No action was ever taken on the class action motion as it related to those retirees falling outside the class of early retirees, a group of approximately 34,000 individuals referred to in the litigation as "general retirees" (A. 116a).

In 1993, the court conducted a bench trial on the ERISA contract claims of subclasses 1 and 2, the two principal subclasses of early retirees. Members of those subclasses had signed long form or short form "Statements of Acceptance" of early retirement indicating their agreement with the benefits package and, in most cases, providing a general release in favor of GM against claims of age discrimination and other claims.[1]

In *Sprague II*, the district court found that the "members of the plaintiff class were offered a special deal, the terms of which go beyond the general retirement plan" (A. 189a). The court found that "virtually all of the benefit explanations provided to the early retirees by GM contain statements regarding both the duration of health care benefits ('for life,' 'during retirement,' 'continued after retirement,' 'lifetime,' 'will be continued,' 'for the rest of your lives'); and the cost of the benefits ('no cost to retiree,' 'paid up,' 'at corporation expense,' 'without cost,' 'free,' 'GM pays full costs,' 'corporation paid basis,' 'at GM's expense,' 'paid for life by General Motors,' 'fully paid by GM')" (A. 215a). The court held that "GM entered into contracts with its early retirees which vested in the retirees and their spouses certain health care benefits for their lifetimes at no cost to them. . . . These early retirement agreements are enforceable under ERISA as independent bilateral contracts, or as modifications of GM's health care benefit plan" (A. 183a).

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[1] Subclass 3 members signed a "Statement of Intent to Retire." Approximately 5,000 early retirees made up this subclass. They did not have bilateral contract claims. The district court in *Sprague III* resolved their estoppel claims in their favor on the basis of the trial record, however (*see* A. 110a).

The district court also declined to decertify the class. In referring to the sample of class members used for the trial, the court stated (A. 124a):

> As a group, the 318 individuals are representative of their respective subclasses and the class as a whole from the standpoint of the typicality and commonality of their claims, and from the standpoint of GM's action on grounds generally applicable to the class. Those who testified are representative of the class in terms of facilities in which they worked, time-frame, and types of early retirement. Moreover, plaintiff class does not rely exclusively on the testimony of their witnesses. Much of the documentary evidence comes from the personnel files of randomly selected retirees, as well as other sources. Finally, GM failed to produce any significant rebuttal evidence to demonstrate that the treatment of plaintiffs' witnesses was atypical.

In *Sprague III*, the court found in favor of the early retirees on their estoppel claims, and granted GM's summary judgment motion regarding general retirees (A. 102a-110a). The court also granted a limited injunction during appeal to avoid hardships (A. 112a-113a).

3. Sixth Circuit Proceedings.

The parties cross-appealed. On August 14, 1996, a panel of the Sixth Circuit unanimously upheld the judgment in favor of the early retirees, upheld the class action, reversed the dismissal of fiduciary duty claims, and remanded the claims of the general retirees (A. 54a).

The Sixth Circuit granted GM's motion to rehear the case *en banc* and vacated the panel decision (A. 238a). The *en banc* court issued its opinion on January 7, 1998 (A. 1a). Eight judges ruled against the retirees on all claims. Five judges dissented in whole or in part.

First, the court decided that the district court abused its discretion in certifying the class of early retirees, holding that their issues were "anything but common" (A.

13a). The court also ruled that the class of early retirees failed the typicality test because a "named plaintiff who proved his own claim would not necessarily have proved anybody else's claim" (A. 16a).

Second, the court ruled against petitioners on the general plan issues. The court affirmed the summary judgment ruling in *Sprague I* that GM unambiguously had reserved the right to amend or terminate its plan (A. 17a-23a). The court held that where an SPD contains both a promise of lifetime benefits and a statement reserving the right to change the plan, it is unambiguous and the reservation controls as a matter of law (A. 20a). With regard to those SPDs containing a clear statement that benefits are for life at no cost to the retirees, without any stated reservation of right to change the plan, the court held that benefits still do not vest in these circumstances. The court viewed the absence of any reservation language as "silence" on the vesting question (A. 21a), and stated that "GM was not required to disclose in the summary plan descriptions that the plaintiffs' benefits were not vested" (A. 22a).

Third, the court of appeals reversed the judgment in favor of the early retirees by holding that the bilateral early retirement agreements for lifetime health care are not separately enforceable under ERISA, apart from the terms of the general health care plan (A. 23a-25a). The court determined that an agreement for benefits must satisfy all or most of ERISA's "written instrument" requirements in 29 U.S.C. § 1102 before it can be enforced under ERISA (A. 25a). The court so ruled as a matter of law only, inasmuch as GM did not appeal the factual findings in *Sprague II* as clearly erroneous.

Fourth, the court rejected the petitioners' claims based on estoppel and breach of fiduciary duty (A. 25a-31a), concluding that GM gave out "no inaccurate information" (A. 31a).

Chief Judge Martin, joined by Judges Moore and Cole, authored the principal dissenting opinion, calling for "a finer caliber of analysis" than provided in the *en banc* opinion (A. 38a). Judges Lively and Merritt issued separate partial dissents (A. 33a, 37a).

Judge Martin synopsized the SPDs, stating that "from 1974 to 1985 General Motors distributed employee booklets that promised free lifetime health care and contained no reservation of rights" (A. 40a). He and his colleagues dissented from the majority's view that the presence of "lifetime"/"no cost" language in SPDs meant they were "silent" on the vesting question and stated: "Noting that benefits are 'for your lifetime' is tantamount to saying that General Motors cannot change the plan. . . . [L]ifetime rights are vested rights" (A. 45a).

The Chief Judge wrote that the judgment in favor of early retirees should be upheld and that the "contracts are best enforced under federal common law" (A. 48a). He recounted that the extrinsic evidence of the partially integrated early retirement agreements "includes written materials showing that General Motors personnel used almost virtually every possible permutation of the words 'free lifetime health care' when presenting future benefits to employees." *Id.; see also* A. 34a-35a (Lively, J.).

Judge Martin also found error in the failure to uphold class certification, stating that the district court did not abuse its discretion "when it certified a class in which all the members were seeking exactly the same remedy and doing so under the same legal theories." A. 50a-51a; *see* A. 33a-34a (Lively, J.).

As to the estoppel claims, Judge Martin and his colleagues would have upheld the judgment in favor of early retirees, and would have allowed the general retirees' claims to go forward (A. 48a-50a). Similarly, with respect to the claims for breach of fiduciary duty, the dissent disagreed with the *en banc* majority's view that GM's rep-

resentations concerning lifetime health care were not misleading (A. 52a). Judge Lively added: "It was misleading to tell these employees they would have company-provided health care throughout their lives while at the same time failing to advise them that it was claiming to reserve the right to withdraw the benefit after the employees accepted early retirement" (A. 35a-36a).

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IN CONFLICT OVER WHETHER EXPRESS PROMISES OF LIFETIME HEALTH CARE IN ERISA SUMMARY PLAN DESCRIPTIONS VEST BENEFITS AT RETIREMENT

This Court should grant the petition to resolve the conflicts in the circuits concerning vesting of welfare benefits under ERISA SPDs which contain promises of lifetime health care. Unlike the Sixth Circuit here, other courts of appeals explicitly have recognized the seriousness of these conflicts. *See, e.g., Barker v. Ceridian Corp.*, 122 F.3d 628, 635 (8th Cir. 1997) ("difficult contract interpretation questions"; courts "have not answered this puzzling question uniformly"); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511-12 (10th Cir. 1996) (noting conflicts over these "difficult issues of interpretation"); *see also Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir. 1996) (approach of other circuits termed "interpretive gymnastics").

Here every SPD expressly provided for lifetime health care benefits at no cost to retirees. The Sixth Circuit held that this language neither vests benefits "[n]or even implies that the plaintiffs' benefits were vested" (A. 22a-23a). The decision illustrates the conflicts in the circuits on virtually every aspect of the rules for vesting of ERISA welfare benefits under SPDs.

First, the Sixth Circuit's holding that the presence of both lifetime and reservation of rights language in the

same SPD renders the plan unambiguous against vesting (A. 20a) is squarely in conflict with decisions of other circuits. The Seventh, Eighth, and Eleventh Circuits hold that the presence of both types of statements gives rise to an ambiguity to be resolved by resort to extrinsic evidence. *Barker,* 122 F.3d at 635 (8th Cir.); *Diehl,* 102 F.3d at 306 (7th Cir.); *Stewart v. KHD Deutz of America, Corp.,* 980 F.2d 698, 703-04 (11th Cir. 1993). Even in some cases where courts have declined to find vested benefits in the presence of both types of statements, they have not gone as far as the court below to deny vesting in all such circumstances; rather, the Third and Tenth Circuits might allow vesting in the presence of both types of statements depending on the facts of a particular case. *Chiles,* 95 F.3d at 1512 (10th Cir.) (declining to adopt "hard-and-fast rule"); *In Re Unisys Corp. Retiree Med. Benefit ERISA Litig.,* 58 F.3d 896, 904 n.11 (3d Cir. 1995) ("We do not hold that a reservation of rights will always prevail over a promise of benefits").

Second, the Sixth Circuit decided that an express promise of lifetime benefits in the SPD, unaccompanied by any statement of reservation of right to change the plan, "does not trump the clearly-stated right to do so in the plan itself" (A. 21a). Prior to the decision below, the Sixth Circuit itself subscribed strongly to the principle that "statements in a summary plan [description] are binding and if such statements conflict with those in the plan itself, the summary shall govern." *Edwards v. State Farm Mut. Auto. Ins. Co.,* 851 F.2d 134, 136 (6th Cir. 1988). Underlying this principle is the primacy given the SPD in ERISA as the means of communicating benefits to employees, and the unfairness that would result from allowing employers to disclaim the binding nature of the SPD. *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 982 (5th Cir. 1991).

Now, by deciding that reservations in underlying plan documents "trump" SPDs containing lifetime promises

with no reservations, the Sixth Circuit has placed itself in conflict with the overwhelming majority of circuits that have adopted the principle that SPDs are binding and govern in the event of a conflict with the underlying plan. *Williams v. Midwest Operating Engr's Welfare Fund*, 125 F.3d 1138, 1140-41 (7th Cir. 1997); *Barker*, 122 F.3d at 633 (8th Cir.); *Chiles*, 95 F.3d at 1518-19 (10th Cir.); *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140 (4th Cir. 1993); *Hansen*, 940 F.2d at 981-82 (5th Cir.); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907-08 (2d Cir. 1990); *Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir. 1990); *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570-71 (11th Cir. 1985).[2]

Third, the court of appeals held that the intent to vest "must be found in the plan documents and must be stated in clear and express language" (A. 19a), *quoting Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993); *see Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994) (same), *cert. denied*, 514 U.S. 1057 (1995). The rule that vesting can never occur if the plan is ambiguous has been rejected explicitly by the Second and Seventh Circuits. *Schonholz v. Long Island Jewish Med. Ctr.*, 87

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[2] In this case the Sixth Circuit's "trump" rule doubly harmed petitioners, particularly those approximately 45,000 early and general retirees who retired under SPDs (1974, 1977 and 1980 "Your GM Benefits") with no reservation of rights language of any kind. Not only did they lose the advantage of the "SPD governs" principle, they suffered from the Sixth Circuit's erroneous assumption that the underlying plan clearly reserved to GM the right to change the plan. For the period prior to 1985, the insurance policies and certificates contained no such reservation. For the period 1985 onward, the Court relied on the "draft" plan whose terms applied only to hourly employees and retirees, not salaried personnel. The *en banc* majority ignored petitioners' appeal that GM had no underlying plan or plan amendment procedures in compliance with ERISA's "written instrument" requirements, despite the fact that these issues were amply briefed and were treated in the Sixth Circuit panel decision (A. 78a).

F.3d 72, 78 (2d Cir.), *cert. denied,* 117 S. Ct. 511 (1996) ("employer's intent need not be stated unambiguously"); *Bidlack v. Wheelabrator Corp.,* 993 F.2d 603, 607 (7th Cir.) (*en banc*), *cert. denied,* 510 U.S. 909 (1993) (rejecting position that contract "must state unequivocally" that benefits are vested). It has also been rejected implicitly in numerous decisions recognizing that, in the event of plan ambiguities, vesting can be determined by resort to extrinsic evidence in accordance with basic contract principles.[3] In contrast to the position of the Sixth Circuit, other courts of appeals recognize that the words "lifetime" and "no cost," or similar phraseology, can lead to a determination of vested benefits. *See Diehl,* 102 F.3d at 306-08 (7th Cir.); *Jensen v. SIPCO, Inc.,* 38 F.3d 945, 950-52 (8th Cir. 1994), *cert. denied,* 514 U.S. 1050 (1995); *Stewart,* 980 F.2d at 703-04 (11th Cir.).

The Sixth Circuit's departure from the rules for vesting under SPDs adopted by other courts of appeals affects more than contractual vesting claims under ERISA § 502(a), 29 U.S.C. § 1132(a). Here petitioners also brought claims based on estoppel and breach of fiduciary duty. The Sixth Circuit acknowledged that these claims are cognizable under ERISA, but dismissed them largely on the same basis as it did the vesting claims: the court determined that since GM had reserved the right to change its plan and was not required to warn employees in SPDs of the unvested nature of retiree health benefits, its representations were accurate (A. 27a-31a). Although these claims thus should be restored if the vesting claims

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[3] *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp.,* 122 F.3d 228, 233 (5th Cir. 1997); *Barker,* 122 F.3d at 634-38 (8th Cir.); *Stewart,* 980 F.2d at 703-04 (11th Cir.); *Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90, 96 (3d Cir. 1992); *United Paper Workers Int'l Union v. Champion Int'l Corp.,* 908 F.2d 1252, 1256-57 (5th Cir. 1990); *Bower v. Bunker Hill Co.,* 725 F.2d 1221, 1224 (9th Cir. 1984).

are restored, the overriding concern is the wider swath cut by the Sixth Circuit's decision.

In the decision below, the Sixth Circuit has raised the bar to vesting higher than has any other court. In doing so, the court heightened the conflict among the circuits with respect to the interpretational rules for vesting under SPDs, and created a conflict with respect to the primacy of SPDs over conflicting terms in underlying plans. This Court should intervene to resolve these conflicts that affect every ERISA welfare plan and participant alike.

II. THE SIXTH CIRCUIT'S REJECTION OF THE EARLY RETIREMENT AGREEMENTS CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS UPHOLDING INDIVIDUAL BENEFIT ARRANGEMENTS UNDER ERISA

The Sixth Circuit held that the bilateral early retirement agreements for lifetime health care are unenforceable because they do not contain all or most of the "written instrument" requirements for ERISA plans, 29 U.S.C. § 1102 (A. 23a-25a). The decision conflicts with decisions of other courts of appeals upholding various types of individual benefit agreements and arrangements under ERISA, regardless of whether the employer also offers a more general plan covering the same types of benefits, and regardless of whether the employer complies with the "written instrument" requirements. In contrast with those decisions, the Sixth Circuit's decision fundamentally misconstrues the threshold requirements for ERISA coverage, abrogates ERISA's federal common law of contracts, and deprives employers and employees alike of the flexibility provided by Congress to enter into individual benefit agreements protected by ERISA.

The courts of appeals other than the Sixth Circuit recognize that benefit arrangements need not fulfill all the formalities of the written instrument requirements in order to qualify as ERISA plans. ERISA's definition of a welfare plan includes "any plan, fund, or program . . .

established or maintained by an employer . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1). In the seminal opinion in this area, the Eleventh Circuit held that an ERISA plan is established "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*). The *Dillingham* test has been adopted in every Circuit. *See Kenney v. Roland Parsons Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir. 1994) (collecting cases); *Grimo v. Blue Cross/Blue Shield, of Vermont*, 34 F.3d 148, 151 (2d Cir. 1994). The Sixth Circuit now has rejected the *Dillingham* test by requiring compliance with the "written instrument" requirements before a contract for ERISA benefits will be enforced.

The Sixth Circuit's view that ERISA's formal writing requirements supersede the *Dillingham* test has been repudiated by other courts of appeals. Although employers have a fiduciary duty to reduce a plan to writing in accordance with ERISA's requirements, the existence of a written instrument is not a prerequisite to ERISA coverage. *Dillingham*, 688 F.2d at 1372; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985); *see Miller v. Taylor Insulation Co.*, 39 F.3d 755, 760 (7th Cir. 1994). As stated by the court in *Memorial Hospital Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241 & n.5 (5th Cir. 1990): "A formal document designated as 'the Plan' is not required to establish that an ERISA plan exists; otherwise, employers could avoid federal regulation merely by failing to memorialize their employee benefit programs in a separate document so designated."

The rejection of the early retirement agreements for lifetime health care by the Sixth Circuit not only conflicts with the decisions of other circuits, but it also threatens to undermine ERISA's mandate "to protect contractually defined benefits." *Firestone Tire & Rubber Co.*

v. Bruch, 489 U.S. 101, 113 (1989). Beyond the Sixth Circuit, employers and employees are free to forge benefit agreements to cover a variety of situations outside the company's general ERISA plan, without losing ERISA's protections. Individual severance arrangements are a prime example. *See Cvelbar v. CBI Illinois, Inc.*, 106 F.3d 1368, 1376 (7th Cir.), *cert. denied*, 118 S. Ct. 56 (1997); *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991) (letter to departing manager an ERISA plan in part); *cf. Frahm v. Equitable Life Assurance Society*, —— F.3d ——, 1998 WL 81457 at *2 (7th Cir. 1998) (discussing ERISA welfare plans: "Bilateral agreements on the length of vacation and amount of severance pay are common, and if these are proper then bilateral agreements about health care must also be proper"). The Third Circuit has determined, in the context of early retirement benefits, that "[r]eservations to the employer to make welfare benefits determinations on an individual basis are not prohibited by ERISA and allowing them furthers the interest of employees." *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 78-79 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992). These decisions are flatly irreconcilable with the Sixth Circuit's rationale requiring compliance with ERISA's written instrument requirements before bilateral contracts for ERISA welfare benefits can be enforced.[4]

The petition should be granted to determine which of "competing congressional purposes," *Varity Corp. v.*

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[4] The defense of the early retirement agreements as independent ERISA plans was argued forcefully to the Sixth Circuit in this case by the Secretary of Labor, who has primary enforcement authority for Title I of ERISA and represents the public interest as well as the interests of plan participants and beneficiaries. *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692-93 (7th Cir. 1986) (*en banc*). In *Cvelbar*, 106 F.3d at 1376, and *Williams*, 927 F.2d at 1545, the courts deferred to the views of the Secretary on the enforceability of single-employee ERISA plans.

Howe, 516 U.S. 489, 497 (1996), governs when an employer contracts for benefits apart from the regular plan. Should the contracts be enforced under the "federal common law of rights and obligations under ERISA-regulated plans," *Firestone Tire & Rubber Co.*, 489 U.S. at 110, irrespective of the level of formality chosen by the employer in promulgating the benefit arrangement? Or should employers be relieved from "their improvident commitments," *Bidlack*, 993 F.2d at 609, because they chose not to comply with all of ERISA's formal writing requirements in forming the contracts? *Cf. Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 844 (1998) (Breyer, J., concurring) (under statute meant to protect employees, treating defective releases as voidable rather than void protects against employer decision "to cancel its own reciprocal obligation" for health benefits or other consideration). Petitioners request the Court to resolve this important conflict to ensure that participants who contract for ERISA benefits are not "afford[ed] less protection . . . than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co.*, 489 U.S. at 114.

III. THE SIXTH CIRCUIT'S DECISION MISAPPLIED FED.R.CIV.P. 23, DEPRIVING CLASS ACTION TREATMENT FOR ERISA CASES WITH UNIFORM CLAIMS

The Sixth Circuit dismantled the early retiree class on the basis that there was no commonality or typicality of factual or legal issues under Fed. R. Civ. P. 23(a) (A. 13a-17a). The court's decision presents an important issue for review because it leaves participants and beneficiaries in large ERISA cases without an effective remedy.

The district court certified the early retiree class under Rule 23(b)(2) because GM "acted or refused to act on grounds generally applicable to the class" (A. 220a, 222a). Instead of focusing on the legal and factual issues common to the class, as Rule 23 requires, the court applied a test of "predominance" applicable to Rule

23(b)(3) cases that has no place in Rule 23(b)(2) cases, and required virtual identity of claims among classmembers. The court's conversion of a dispute involving common issues into one requiring thousands of trials on uniform claims is contrary to both the precepts of Rule 23 and the remedial purposes of ERISA.

The court of appeals acknowledged that there need be only one question of law or fact common to the class, and that there was commonality among both general and early retirees as to plan documents and plan interpretation issues (A. 13a).[5] The court had before it the district court's analysis of the representativeness and consistency of petitioners' classwide proof and the uniformity of GM's defense (A. 122a-124a, 136a-138a), as well as the district court's extensive unappealed factual findings of the uniform "special deal" offered to early retirees in exchange for their early departure from GM (A. 128a-219a).

Instead of focusing on these representative legal and factual issues common to the class, however, the Sixth Circuit focused almost exclusively on differences among individual classmembers (A. 14a-15a), and "each individual's particular interactions with GM" (A. 16a). The court concluded that the named plaintiffs could not advance the interests of the entire early retiree class because "[a] named plaintiff who proved his own claim would not necessarily have proved anybody else's claim" (*id.*).

This treatment inappropriately applied Rule 23(b)(3)'s test for predominance in a Rule 23(b)(2) case. "[T]he question of whether common issues 'predominate' over in-

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[5] While stating that the general retirees "may have been better-suited for class treatment than the early retirees," the court concluded that the non-certification of general retirees was "unexceptionable" because their primary claims had already been decided against them before the class certification decision (A. 12a). Thus, if the general plan issues are revived, the class certification question for the general retirees and the general plan issues will also be revived.

dividual ones has no place in determining whether a case should be certified under 23(b)(2)." *Forbush v. J. C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993); *accord Adamson v. Bowen*, 855 F.2d 668, 675-76 (10th Cir. 1988).

Requiring named plaintiffs to "prove[] anybody else's claim" is a concept of virtual identity of claims embodied nowhere in Rule 23; indeed, it is a concept antithetical to the typicality requirement of Rule 23(a). *See Adamson*, 855 F.2d at 676 ("differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory"); Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.13 at 3-76 (3d ed. 1992) ("plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory").

Consideration of individual differences among classmembers cannot substitute for the commonality and typicality inquiry, which looks at traits of the class as a whole to determine if there is a "sufficient unity" to bind the interests of absent classmembers. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997). By doting on differences rather than similarities among early retiree classmembers, the Sixth Circuit inverted the Rule 23 process. Along with the concededly common issues the early retirees shared with the general retirees, the court needed look no further than "the common question of what GM promised [early retirees] in order to induce them to retire" (A. 51a) (Martin, C.J., dissenting).

The Sixth Circuit's decertification of the early retiree class places judicial relief out of reach for ERISA participants subjected to common treatment by a large employer. A writ should issue to the Sixth Circuit to review the standards for commonality and typicality in a manner that

gives due regard to Rule 23 and ERISA's purposes, and that leaves the courthouse doors open for participants in large ERISA cases.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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